that the defendant should be held responsible for the award not being delivered. But the solution at all times in fact lay in his own hands. Either party to an arbitration can take up the award on payment of the arbitrator's charges; until payment the arbitrator has a lien on the award for his fees. Hence the allegations of negligence are not only groundless but frivolous and vexatious. The plaintiff's own bundle of documents (marked "A") abundantly bears out this view.

As to the matter of the action, Civil Suit No. 334 of 1955, the plaintiff admitted that he had "agreed in the presence of the Judge to the settlement terms as recorded," but said that he was forced into it. Duress is not synonymous with negligence. Even the suggestion of duress is so far-fetched as not to merit a moment's consideration.

I accordingly dismissed the action with costs.

Action dismissed.

Solicitors:—*Braddell & Ramani.*

PUBLIC PROSECUTOR v. THUI KUAN WING

[R.Cr.J. (Hashim J.) October 17, 1963]

[Kuantan — Criminal Revision No. 4 of 1963]

Criminal Procedure—Jurisdiction—Magistrate who is also President, Sessions Court—Cannot sit on Bench in dual capacity.

Criminal Procedure—Persons convicted under the Prevention of Crime Ordinance, 1959—Binding over of—Whether proper.

A Magistrate who is also a President of the Sessions Court cannot sit on the Bench in his dual capacity. If he finds that a case should properly go before the Sessions Court he should adjourn court if he is sitting as a Magistrate and register the case as a Sessions Court case. He should then sit again as President and deal with the case in that capacity.

The Prevention of Crime Ordinance deals with the prevention of crime. From the First Schedule to the Ordinance it could be seen that the persons affected by this Ordinance are members of unlawful societies, gangsters, extortioners, traffickers in opium chandu and other dangerous drugs, traffickers in women and girls and gambling promoters. To bind over such a person who has been convicted under this Ordinance is manifestly inadequate and would defeat the purpose of the Ordinance.

CRIMINAL REVISION.

Hashim J.: This case has been referred to me by the Deputy Public Prosecutor, Pahang.

The accused was charged in the Magistrate's Court, Temerloh under section 15(2)(e) of the Prevention of Crime Ordinance No. 13 of 1959. He pleaded guilty to the charge. The learned Magistrate convicted him and bound him over in the sum of $500 with 2 sureties for a period of one year under section 294(i) Criminal Procedure Code (Cap. 6). The penalty section is section 15(4) of Ordinance No. 13 of 1959 where the maximum sentence is 5 years.

I think I have said it before but I repeat that a Magistrate who is also a President of the Sessions Court must bear in mind that he cannot sit on the Bench in his dual capacity. He is sitting either as a Magistrate or as a President. If and when he finds that a case should properly go before the Sessions Court he should adjourn Court if he is sitting as a Magistrate and register the case as a Sessions Court case. He should then sit again as President of the Sessions Court and deal with the case in that capacity.

In this case the maximum sentence that can be imposed is 5 years imprisonment. There appears to be nothing in the Ordinance which empowers a Magistrate to try offences committed under this Ordinance. It would therefore logically follow that all offences under this Ordinance should be tried in a Sessions Court.

I would like to make one further observation. This Ordinance deals with the prevention of crime and I would invite attention to the First Schedule to the Ordinance under the heading "Registrable Categories". It could be seen that the persons affected by this Ordinance are members of unlawful societies, gangsters, extortioners, traffickers in opium, chandu and other deleterious drugs, traffickers in women and girls and gambling promoters. To bind over such a person who has been convicted under this Ordinance would appear to be manifestly inadequate and would defeat the purpose of the Ordinance. I would quote section 15(4) of this Ordinance:—

"A registered person who contravenes or fails to comply with any order or restriction imposed on him under this section shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding five years and not less than two years".

I quash the conviction and sentence and order that the accused be charged in the Sessions Court with the same charge.

Order accordingly.

SENIK v. HASSAN & ANOR.

[A.C.J. (Suffian J.) October 26, 1963]

[Alor Star — Kedah Civil Appeal No. 5 of 1963]

Land Laws—State Land—Kedah Enactment No. 56 (Land), s.28—Unlawful occupier dispossessed by trespasser—Whether occupier can sue in trespass for possession.

Practice—Jurisdiction—Waiver—Courts Ordinance, 1948, s.70—Attempt by parties to determine disputes in subordinate courts not be discouraged.

A person who is in unlawful occupation of State land may maintain an action for trespass against the person from whom he acquires it and by whom he is subsequently dispossessed of it.

A trespasser to State land cannot plead the Ruler's superior title and can only succeed if he shows a better right to possession in himself.

Cases cited in argument:—

(1) *Mohamed Hassan* v. *Haji Mohamed Eusop* (1913), Innes 282.

(2) *Nawab Din* v. *Mohamed Shariff & Ors.* [1953] M.L.J. 12.

(3) *Tee Say Poh* v. *Jais bin Haji Salleh* [1939] M.L.J. 330.

(4) *Julika Bivi* v. *Mydin* [1961] M.L.J. 310.

(5) *Abraham Ho Ah Loke* v. *William Manson-Hing* [1949] M.L.J. 37.

(6) *Anning* v. *Anning* (1907) 4 C.L.R. 1049, 1061.

CIVIL APPEAL.

B. Kaher Singh for the appellant.

A. Jayadewa for the respondent.

Cur. Adv. Vult.

Suffian J.: This appeal raises the question whether the plaintiff who was in unlawful occupation of State land may maintain an action for trespass against the defendant from whom he had acquired the land and by whom he was subsequently dispossessed of it.

The defendant planted rubber on State land. This must have been many years ago, for certainly by May, 1958, the rubber was tappable. He had no permission of any kind to cultivate the State land, and it is not in controversy that even today not only has he no title, he has not even a Surat Akuan to it.

The facts as found by the learned President, and I see no reason to disturb his findings, are that the defendant was related to the plaintiff, the defendant owed $1,200 to Yeoh, some time in 1958 the defendant asked the plaintiff to pay off this loan, the plaintiff agreed to do so, he borrowed money from his co-operative society, and he paid Yeoh the $1,200. The consideration for all this was that the defendant should transfer his rubber land to the plaintiff if the Government were to approve his application for the land. The defendant let the plaintiff into possession, the plaintiff tapped the rubber for about 18 months, the defendant gave notice to the plaintiff to vacate and even before the notice expired the defendant dispossessed the plaintiff of the land.

The plaintiff claimed (a) possession of the land, (b) special damages at $16.50 per day (being the profit derived by the plaintiff from working the land) from date of dispossession until delivery of possession, (c) damages for trespass and (d) costs. As regards prayer (b), the plaintiff expressly waived in his statement of claim any excess that might bring this claim outside the jurisdiction of the Sessions Court.

The learned President granted prayers (a), (b) (subject to a maximum of $2,000) and (d) and as regards prayer (c) gave the plaintiff $200 damages for trespass.

The defendant appeals on four grounds.

First, it is said that that the learned President's order contravened section 28 of the Kedah Land Code which reads:—

"Unlawful occupation of State land or occupation of State land under licence for temporary occupation for however long a period shall not establish any right in or possession of State land."

Secondly, it is said that as the defendant could not acquire possession of the State land contrary to section 28, he had not possession of it and therefore the Court cannot order him to surrender it to the plaintiff.

Thirdly, it is said that if, as the learned President found, the defendant had borrowed money from the plaintiff, the transaction between them as regards the land was not a sale but only a mortgage.

Fourthly, as the plaintiff claimed delivery of possession of the land the learned President had no jurisdiction to hear and determine the case.

Taking the point of jurisdiction first, subsection (1) of section 70 of the Courts Ordinance 1948, provides that a Sessions court shall have jurisdiction to hear and determine any action or suit for the recovery of immovable property — and that is all that this action is about — and sub-section (2) provides that in this action there may be added a claim for mesne profits (as here) and for damages arising to the plaintiff from the defendant resisting his right of possession or re-entry (as here), but this is subject to the condition in sub-section (3) that the money claim shall not exceed the sum of $1,200. Here the plaintiff has expressly stated in his statement of claim that he waives any claim that may exceed the jurisdiction of the Sessions Court. Any attempt by parties to have their disputes determined in the subordinate courts should not be discouraged and I am of the opinion that this express waiver brings this action within the jurisdiction of the Sessions Court, so that if the other grounds of appeal are rejected the special damages to be awarded to the plaintiff should be reduced to $1,000 which, together with the general damages (which should remain at $200), keep this matter within the jurisdiction of the Sessions Court.

As regards the third point, suffice it to say that it was never raised in the trial court and I therefore reject it. It could not have been raised there because the defendant's defence was that he had nothing whatsoever to do with the plaintiff, he had owed Lee (another Chinese) $800, in order to pay off this loan he leased this land to Lee for 18 months, presumably rent-free, and at the end of that period he took back the land from Lee. The learned President rejected this defence and found the facts to as alleged by the plaintiff.

As regards the first and second grounds of appeal, it is not disputed that the land in question is State land and it has been unlawfully cultivated and occupied by the defendant. After 1958 it was possessed and tapped by the plaintiff and on 4th December 1959 he was wrongfully dispossessed by the defendant.

The law as regards the land is quite clear.

The entire property in and control of State land is vested solely in His Highness the Sultan, section 6 of the Land Code.

Unlawful occupation of State land shall not establish any right in or possession of State land, section 28.

No title to land adverse to or in derogation of the title of the proprietor shall be acquired by any length of possession by virtue of the Limitation Ordinance, 1953, nor shall the title of any proprietor be extinguished by the operation of the said Ordinance, section 43A.

But it should be emphasized that the plaintiff sues in trespass. He admits he has no title. But he is not asserting a claim against His Highness nor against any registered proprietor. He is asserting a claim against a person who was originally, rightly or wrongly, in possession who later put him in possession and who subsequently dispossessed him. And this other person (the defendant) admits that he is neither the holder of a Surat Akuan nor a registered proprietor of the land.

The law of trespass is in my view also quite clear.

Trespass is an injury to a possessory right. The plaintiff must have been in possession at the time of the trespass. Any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support the action. It is not necessary that the plaintiff's possession should be lawful and actual possession is good against all except those who can show a better right of possession in themselves. See *Halsbury's Laws of England,* 3rd edition, volume 38, paras 1213 and 1214 and the cases cited therein.

All section 28 of the Land Code does is to provide that an unlawful occupier of State Land shall not by his occupation acquire any right in the land nor any possession thereof; it only regulates the relations between him and His Highness by whom he can always be dispossessed. But it does not regulate the relations between him and a trespasser by whom he was dispossessed. This latter person in an action for trespass cannot plead His Highness' superior title, he can succeed only if he shows a better right to possession in himself. This the defendant has not done.

Therefore the learned President was right in entering judgment for the plaintiff. Accordingly the appeal is dismissed, the learned President's order is affirmed except that the order on prayer (b) is varied by reducing the special damages to $1,000.

The defendant shall pay costs below and here. His deposit to be paid to account of plaintiff's costs.

Solicitors:—*Kaher Singh & Karam; Jayadewa & Zahir.*